

Highways—Condemnation of on Railroad Right of Way.

A right of way can be acquired upon a railroad right of way by condemnation, subject to limitations.

March 5, 1920.

State Highway Commission,
Helena, Montana.

Gentlemen:

I have a letter asking that I advise you whether or not your commission has authority to condemn a railway right of way for highway purposes.

Your question is somewhat indefinite, but I assume that you desire to know whether your commission has authority to acquire by condemnation any portion of a railway right of way for highway purposes, when the railway company owning such right of way is using the same in the operation of its railway.

Chap. 170 Sess. Laws 1917, creating the State Highway Commission, defining its powers and duties, etc., was amended by Chap. 20 Sess. Laws Extra Sess. 1919, by adding two new sections thereto numbered 6(e) and 6(f). By section 6(e) the commission is given authority to exercise the power of eminent domain for the purpose of acquiring rights of way for highway purposes, and this is sufficient authority to acquire by condemnation a portion of the right of way of a railway company for use for highway purposes, with certain limitations.

Under this authority you may, when it is necessary for a highway to cross a railway right of way, acquire a right of way for such purpose by condemnation, but you cannot acquire any portion of a railway right of way for highway purposes when it is proposed to construct the highway upon and longitudinal with the right of way (2 Lewis Eminent Domain 3rd ed. Sec. 417; 2 Nichols Eminent Domain 2nd ed. Sec. 361).

I have not investigated the question of your authority to acquire by condemnation a right of way over a railway right of way when no part of such right of way is being used by a railway company in the operation of a railway, but if this questions is also involved in your question kindly advise me and I will also investigate it.

Respectfully,

S. C. FORD,

Attorney General.